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## Othering and the Law

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# ARTICLE

## OTHERING AND THE LAW

SUSAN J. STABILE\*

### INTRODUCTION

Although some of our laws address the needs of citizens of the United States as a whole, many of our laws are designed to address the conditions and needs of one or more discreet subsets of the population. Thus, we debate the merits of laws addressing, for example, illegal immigrants, the poor, and criminals.

Our view of the issues relating to the needs and conditions of different groups of persons, and, therefore, of the legal strategies designed to address those needs and conditions, is very much affected by the fact that often the population subset we are talking about is not viewed as “us,” in the way we think of ourselves. Rather, they are “others.”

The contention of this Article is that an underlying attitude of “othering” pervades current discussions about what the law should and should not do to address the conditions and needs of various categories of persons. Although we do not necessarily acknowledge it, the fact that our discussions proceed from a view of the people whose situations or problems being discussed as “other” makes a difference in how we evaluate various legal and public policy initiatives. The corollary is that if, instead of proceeding from a view of others as fundamentally “not us,” we possessed an attitude of solidarity, of valuing others and seeing them as not separate or other, our views on any number of issues of public policy might be very different.

The fact that othering affects our evaluation of public policy issues has implications regarding the role of law. That is, we need to be conscious of

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the ways the structure of law and public policy promotes either othering, or a view of human persons as possessing equal dignity and being part of a communal whole.

I am not concerned in this Article with a detailed discussion or resolution of any particular question of law or public policy; scholars have addressed how othering permeates legal discourse in areas as diverse as human trafficking<sup>1</sup> and intercountry adoptions.<sup>2</sup> Instead, although of necessity I will use particular examples to highlight the problem, my focus here is the attitude of othering itself and how the law might help move us to a different perspective. I begin in Section I by discussing the prevalence of othering, as well as the forces that promote this way of viewing others. Section II explores how othering infects public policy debates on any number of issues. Section III articulates a vision of the human person and human relations that I believe should be the foundation and ideal for our legal system, a view very much at odds with othering. Finally, Section IV addresses how the law might move us from an attitude of othering to one of communion.

## I. OTHERING AND ITS MANIFESTATIONS

### A. *The Process of Othering*

“Othering” refers to a process by which individuals and society view and label people who are different in a way that devalues them.<sup>3</sup> Othering “operates across multiple dimensions to reinforce a conception of a virtuous ‘Self’ and a lesser ‘Other.’”<sup>4</sup> We determine that certain people are “not us,” and that determination “functions to create . . . a devalued and dehumanized Other,” and a distancing of the other from ourselves.<sup>5</sup> That obviously affects how we view such persons’ needs and interests.

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1. Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009) (arguing that othering is a root cause of inaction in addressing human trafficking).

2. Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think about Intercountry Adoption*, 30 MICH. J. INT’L LAW 413 (2009). See also Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDIS. L.J. 65 (2012) (discussing the othering of Muslims in the U.S.).

3. When I talk about the “other” and “othering,” I am not referring to the bare psychological process by which an individual establishes her identity by distinguishing between the self and other persons. There has been some discussion of this othering process in social science literature. See, e.g., Alex Gillespie, *Collapsing Self/Other Positions: Identification Through Differentiation*, 46 BRIT. J. SOC. PSYCH. 579 (2006); Vivian L. Vignoles et al., *Beyond Self-Esteem: Influence of Multiple Motives on Identity Construction*, 90 J. PERSONALITY & SOC. PSYCH. 308 (2007); Jack K. Martin et al., *Of Fear and Loathing: The Role of “Disturbing Behavior,” Labels, and Causal Attributions in Shaping Public Attitudes Toward People with Mental Illness*, 41 J. HEALTH & SOC. BEHAV. 208 (2000).

4. Todres, *supra* note 1, at 607.

5. *Id.* at 614. See Pedrioli, *supra* note 2, at 72 (arguing that the discourse of othering dehumanizes the other, justifying negative action toward them).

Othering is not identical with stereotyping. Stereotyping puts others in particular categories that are then used “to simplify the task of perceiving, processing, and retaining information about people in memory.”<sup>6</sup> Stereotyping involves making judgments about a person based on perceived characteristics of the particular group to which the person belongs rather than on an individual assessment of the person.<sup>7</sup> Othering does not necessarily depend on forming particular judgments about the characteristics of a particular group, although it may, or drawing conclusions about a particular person based on characteristics of the group of which he is a part.<sup>8</sup> Rather, the judgment is more broadly a judgment that the other in question is “not me,” or “not us.” Stereotyping can be a manifestation of othering, and, like othering, often operates more unconsciously than consciously.<sup>9</sup> However, it does not necessarily carry a judgment that the “other” is less than oneself.<sup>10</sup>

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6. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

7. “[O]nce in place, stereotypes bias intergroup judgment and decisionmaking . . . function[ing] as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.” *Id.*

8. Stereotyping involves making associations between a particular group and particular traits. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949–50 (2006) (defining a “social stereotype” as “a mental association between a social group or category and a trait”). Whereas othering says simply, that person (who may be poor, or Asian or black, or homosexual) is different from me, stereotyping involves judgments that, “the poor are lazy and shiftless” or “Asians are good in science,” etc. A 2008 study provides a good example of stereotyping. A group of people were asked to look at two pictures of identical women, except that in one picture the woman was wearing an Islamic headscarf. Not only was the covered woman perceived as more traditional and wealthier, but subjects displayed an aversion to her that they did not display toward the same woman without the scarf. Arthur Kover, *See What a Difference a Shawl Makes* (Jan. 4, 2008), <http://www.mediacurves.com/Culture/J6652/>.

9. *See* Krieger, *supra* note 6, at 1188 (pointing out that stereotypes “operate beyond the reach of decisionmaker self-awareness”). *See also* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005). Krieger suggests that stereotype biases “operate absent intent to favor or disfavor members of a particular social group.” Krieger, *supra* note 6, at 1188. *See also* John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, in *THE SOC. PSYCHOLOGY OF GOOD AND EVIL* 141, 144 (Arthur G. Miller ed., 2004) (discussing the fact that racial bias “may occur spontaneously, automatically, and without full awareness”). Ivan Bodensteiner, however, argues that “choos[ing] to make decisions based on stereotypes rather than individual assessments [involves] a conscious decision to disfavor members of groups he views negatively.” Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 85 (2008).

10. An example of such a stereotype is that notion that all Asians are good at math and science. Othering is much closer to what Judge Noonan calls “masks,” by which he means the “legal construct suppressing the humanity of a participant in the [legal] process.” JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 20 (2002). But even there, although Noonan suggests that “masks may be seen as devices reflecting the structure of society and the degrees of its acknowledgement of humanity in different groups,” *id.* at 23, therefore operating similarly to othering in its effect, for Noonan, it is the fact that there are points “where it is too much [for the legal system] to recognize that a human being exists” that results in the creation of masks. *Id.* at 26.

The starting point of the process of othering is fairly benign. We all identify ourselves as parts of various groups—ethnic, religious, racial, familial, geographic—and it is that identification that creates a separation between those in the group and those outside. When I say: I’m a New York City born and bred, Caucasian, Catholic, female of Italian-American heritage, to at least some degree, I exclude from me—from who and what I am—non-Caucasian, non-Catholic, male, Irish, Polish, non-New York, rural, and so on. I define myself in a way that makes others different from me.

The psychologist Erik Erikson refers to this as “pseudo-speciation,” a term that “denotes the fact that while man is obviously one species, he appears . . . on the scene split up into groups (from tribes to nations, from castes to classes, from religions to ideologies) which provide their members with a firm sense of distinct and superior identity and immortality.”<sup>11</sup> This behavior is transmitted from one generation to the next, forming different cultures.<sup>12</sup> A group sees the similarities of its members and forms a culture, and when it does, it sees that culture as separate from those who do not fall into the group.

Note that Erikson speaks of a development of not only a *distinct*, but a *superior* identity. Quite easily, those who are “not us” come to be seen not only as *different*, but as *less than* us. Jane Goodall observed a startling example of this in her study of chimpanzees.<sup>13</sup> An extended family of chimps split into two groups, one moving to the south and another to the north. It took no more than a couple of years for the family to split into “us” and “others” and for tensions to mount so high that one group literally annihilated the other and inflicted on them the kind of injuries that are generally only seen when chimpanzees are trying to kill a large prey animal of another species.<sup>14</sup> Goodall observed that this was not a fear of strangers since the members of the Kahama community were familiar to their aggressors. “The members of the Kahama community had, before the split, enjoyed close and friendly relations with their aggressors; in some cases they had

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11. ERIK H. ERIKSON, *GANDHI’S TRUTH* 431 (1969). See ERIK H. ERIKSON, *INSIGHT AND RESPONSIBILITY* 125–26 (1964); Rodney D. Olsen, *Identity’s Architect: A Biography of Erik H. Erikson*, 87 J. OF AM. HIST. 1112 (2000).

12. *Id.*; see also Tony Smith, *Social Violence and Conservative Social Psychology: The Case of Erik Erikson* 13 J. PEACE RES. 1 (1976).

13. See generally JANE GOODALL, *REASON FOR HOPE* (1999) [hereinafter *REASON FOR HOPE*]; JANE GOODALL, *THROUGH A WINDOW* (1990) [hereinafter *THROUGH A WINDOW*]; see also CAROL LEE FLINDERS, *ENDURING LIVES* 97–182 (2006) (discussing Goodall’s work).

14. *REASON FOR HOPE*, *supra* note 13, at 130–31 (observing that when the Kasakela males attacked Kahama chimps, they “showed aggressive patterns not seen during fights with members of their own community, yet seen regularly when chimpanzees are trying to incapacitate and dismember a large prey animal”); *THROUGH A WINDOW*, *supra* note 13, at 210 (observing that some of the patterns of attack had “never been seen during fights between members of the same community—the twisting of limbs, the tearing off of strips of skin, the drinking of blood” and was usually seen only when chimpanzees are trying to kill adult prey animals).

grown up with them and had traveled, fed, played, groomed, and slept together.”<sup>15</sup>

What accounted for this behavior? The answer, explains Goodall, is that the chimps had done what human beings do all the time. They had “pseudo-speciated.”<sup>16</sup> Goodall writes, “[b]y separating themselves, it was as though they forfeited their ‘right’ to be treated as group members.”<sup>17</sup> They became strangers, others.

What Goodall observed in the chimps is not much different from what we saw in the early 1990s in Bosnia or in 1994 in Rwanda. The partition of Yugoslavia in World War II set the stage for growing conflict between Serbs and Bosnian Muslims.<sup>18</sup> These two groups “who hated each other so much . . . were all but indistinguishable in their facial traits. It was only by their names that you could tell them apart.”<sup>19</sup> The conflict, which then U.S. Secretary of State Richard Holbrooke called the “largest failure of the West since the 1930s,”<sup>20</sup> resulted in the death of over 200,000 Muslim civilians and ten times that number becoming refugees.<sup>21</sup>

In a similar vein, from April to July of 1994, the people of Rwanda suffered a genocide that claimed almost a million lives as the Hutus slaughtered members of the Tutsis.<sup>22</sup> The two groups shared the same language and the same culture, but the tall and thin Tutsis, who had been favored by the Belgians before Rwandan independence, were resented by the short and stocky Hutus and blamed for many problems that occurred after independence. So the Hutus rose up and attempted to annihilate the Tutsis.<sup>23</sup> I’m not suggesting here that there may not have been abuse of the Hutus by the Tutsis at various times. The point, however, is that two ethnically similar groups that “[spoke] the same language, inhabit[ed] the same areas and fol-

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15. REASON FOR HOPE, *supra* note 13, at 130; *see also* ENDURING LIVES, *supra* note 13, at 148 (noting that “[t]he Kasakela chimps weren’t just savaging members of their own species, they were killing friends, and probably cousins, with whom they had hunted and played and slept”).

16. REASON FOR HOPE, *supra* note 13, at 129–30.

17. THROUGH A WINDOW, *supra* note 13, at 210; REASON FOR HOPE, *supra* note 13, at 130–31 (observing that the Kahama chimps were treated as though “they were thoroughly ‘de-chimpized’”).

18. *See generally* Partick Thursfield, *The Partition of Yugoslavia: A Nazi Plan Recalled*, 279 CONTEMP. REV. 162 (Sept. 2001).

19. George M. Anderson, *Roots of Genocide: Francis M. Deng Discusses Cultural Denial, Self-hatred and Prejudice*, AMERICA, Feb. 9, 2009, at 16.

20. Tim Weiner, *Clinton’s Balkan Envoy Finds Himself Shut Out*, N.Y. TIMES, Aug. 12, 1995, at A5.

21. *See, e.g.,* SABINA RAMET, BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO THE FALL OF MILOSEVIC 156, 347 (2002).

22. Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, HUMAN RIGHTS WATCH (Mar. 1999), <http://www.hrw.org/reports/pdfs/r/rwanda/rwanda993.pdf>; *Rwanda: How the Genocide Happened*, BBC NEWS (Apr. 1, 2004), <http://news.bbc.co.uk/2/hi/africa/1288230.stm> [hereinafter *How the Genocide Happened*].

23. Forges, *supra* note 22.

low[ed] the same traditions”<sup>24</sup> came to view each other in a way that made annihilation of the other seem reasonable.

“Pseudo-speciation” results in denigrating others based on the ways they are different from us culturally, behaviorally, or otherwise. Goodall opines that “[o]ur tendency to form select in-groups from which we exclude those who do not share our ethnic background, socioeconomic position, political persuasions, religious beliefs, and so on is one of the major causes of war, rioting, gang violence and other kinds of conflict.”<sup>25</sup> We may not necessarily have “conscious, intentional control over the processes of social perception, impression formation, and judgment”<sup>26</sup> that creates othering. Nonetheless, “othering” comes in many forms and in various degrees. It appears as fascism, racism, misogyny, homophobia, and religious and ethnic hatred.<sup>27</sup> It also appears as discrimination against the aged and against those with physical disabilities and mental and emotional illnesses.

Even when othering doesn’t lead to the commission of horrendous acts against those who we label as others, it quite often has the effect of excluding others from our locus of concern.<sup>28</sup> Think, for example, of Western reaction to reports of atrocities in places far away. With respect to the genocide in Rwanda, which I already mentioned, there is a very poignant scene in the 2005 movie *Hotel Rwanda* where Don Cheadle—playing the hotel manager Paul Rusesabagina, who risked his life trying to save as many Tutsis as he could—suggests that once the West has seen news reports of what is happening, they will stop it. Surely, he says, once they see what is going on they will not allow it to continue. The response of the world-weary and much more realistic Western reporter bursts the hotel manager’s hopes. The reporter shakes his head and says it won’t matter, that (in a line repeated by the movie’s director Terry George): “It’s simple, African lives

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24. *How the Genocide Happened*, *supra* note 22.

25. REASON FOR HOPE, *supra* note 13, at 131 (suggesting also that the reason Golding’s *Lord of the Flies* is “a terrifying novel [is] because we know that children, given the right (or, rather the wrong) environment, can behave barbarically” and that “cultural speciation is obvious in the terrifying evolution of modern gangs”).

26. Greenwald & Krieger, *supra* note 8, at 946.

27. We are seeing the horrific effects of religious-based othering in the behavior of Islamic militants. Hirsi Ali catalogues some of the recent examples and argues that “the violent acts of radical Islam [cannot] be divorced from the religious ideals that inspire them.” AYAAN HIRSI ALI, HERETIC: WHY ISLAM NEEDS A REFORMATION NOW 2 (2015).

28. Those in the disability movement have long recognized that social barriers create disability and “that the difficulties of living as a disabled person are due to discrimination and prejudice, rather than impairment.” See Tom Shakespeare, *Choices and Rights: Eugenics, Genetics and Disability Equality*, 13 DISABILITY & SOC’Y 665, 669 (1998); see also Adrienne Asch, *The Human Genome and Disability Rights*, DISABILITY RAG AND RES. 12 (Jan.–Feb. 1994) (arguing that the premise of the disability rights movement is that persons with disabilities are disadvantaged far more by negative social attitudes than by their disabilities). Othering also has other potential effects, for example, the danger that we view voting as “a tribalistic exercise in which we express our sympathy for the candidate who most reminds us of ourselves.” *Don’t Vote ‘Yay’*, COMMONWEALTH, Oct. 10, 2008, at 5.

are not seen as valuable as the lives of Europeans or Americans.”<sup>29</sup> Written that way, the words sound harsh, but in fact, the international community turned a blind eye to what happened in Rwanda.

Afterwards, Western leaders vowed, “Never again.”<sup>30</sup> Yet, how much clamor do you hear—in your own heart or on the streets—over the fact that 200,000 Syrians have lost their lives in years of armed conflict.<sup>31</sup> Where is the clamor? The same can be said for any number of other examples. How much of an outcry do we hear about the mass killings of civilians in South Sudan?<sup>32</sup> Or about human trafficking in places like Thailand?<sup>33</sup>

I suspect the same may be at play in the attitudes of at least some people toward U.S. intervention in Syria, the war in Iraq, and, further back in time, the withdrawal of American troops from Vietnam. Let me be clear: in my opinion there are legitimate reasons one might oppose any of these military engagements. However, Syrians tend to get less concern from Americans simply because they are Muslim, a group Americans feel more negatively about than any other group.<sup>34</sup> Many expressed opposition to military intervention in Iraq on the grounds that the Iraqis were not worthy of our attention because they are primitive or prone to violence.<sup>35</sup> And I suspect swallowing the abandonment of the South Vietnamese was easier for many Americans to accept than the abandonment of a Western nation would have been.

Distance may account for some of the lack of concern with the plight of those living in places many Americans cannot even find on a map, but it clearly does not provide a total explanation since we can find many similar examples that are much more proximate. Consider, for example, the early days of the AIDS epidemic. Early on, very little attention was focused on AIDS and not a tremendous amount of effort put into research for treatment

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29. *HOTEL RWANDA* (MGM 2005).

30. See Robert Walker, *Rwanda Remembers the Holocaust*, BBC NEWS (Jan. 27, 2005), <http://news.bbc.co.uk/2/hi/africa/4211621.stm>; see also Barbara Crossette, *In Face of African Crisis, No Plans for World Action*, N.Y. TIMES (Nov. 2, 1996), <http://query.nytimes.com/gst/fullpage.html?res=9C03E7DB1638F931A35752C1A960958260>.

31. Lucy Roberts et al., *Syria: The Story of the Conflict*, BBC NEWS (Mar. 12, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

32. *South Sudan: One Year After Mass Killings in Bentiu, Violence and Displacement Continue*, DOCTORS WITHOUT BORDERS (Apr. 15, 2015), <http://www.doctorswithoutborders.org/article/south-sudan-one-year-after-mass-killings-bentiu-violence-and-displacement-continue>.

33. Sophie Brown, *Tackling Thailand's Human Trafficking Problem*, CNN (June 21, 2014), <http://www.cnn.com/2014/06/20/world/asia/thailand-trafficking-report/>.

34. See *How Americans Feel About Religious Groups*, PEW RES. CTR. (July 16, 2014), <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/>.

35. See, e.g., Victor Davis Hanson, *The Vision Thing*, NAT. REV. (Oct. 17, 2003), <http://www.nationalreview.com/hanson/hanson200310170838.asp> (suggesting that “[m]ost Americans, tragically so, do not find from thirty second film clips that the Iraqi people are all that sympathetic, but rather—after the war, the looting, the suicide bombings, and the complaining—that they are not worth the billions of dollars and the lost lives”). See David Pipes, *An Iraqi [Cultural] Tragedy*, N.Y. POST (Apr. 22, 2003) (speaking of the “inherently violent quality of modern Iraqi society”).



and cure of the disease. Why? Because in the beginning, what did we call AIDS? It was the gay disease.<sup>36</sup> Not only did this have nothing to do with “us,” but many people said and thought things like “[t]hey had it coming” or “[t]hat’s what *they* get for their unnatural behavior.” Or, worse, “AIDS is God’s punishment for homosexuality.” The only people other than homosexuals who we heard of getting AIDS in those early days were drug addicts and Haitians and they were no more “us” than were homosexuals. Only after there started to be significant numbers of AIDS cases among heterosexuals—heterosexuals like “us”—did the disease become something to be taken seriously.

We see the same thing in people’s reactions to news stories about crimes. One of my friends who teaches criminal law once told me that his students have no hesitance admitting that they pay more attention to crimes committed against people like them, whether on racial or, more likely, socioeconomic grounds as identified by neighborhood. They are less bothered about crimes committed against people who are different. One online news report of the murder of five prostitutes in England a few years ago painfully illustrates the extent to which our reaction to crime depends on our judgment of the victim. The article observed that, “in the scheme of things the deaths of these five women is no great loss. They weren’t going to discover a cure for cancer or embark on missionary work in Darfur.”<sup>37</sup> Like other marginalized groups, prostitutes are others; they simply matter less.<sup>38</sup> More

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36. Before the term “AIDS” began to be used, the illness was referred to as the “gay plague,” “gay cancer,” or “gay-related immune deficiency.” See Steve Sternberg, *Profile: Generation AIDS*, USA TODAY (June 5, 2006), [http://www.usatoday.com/news/health/2006-06-04-aids-anniversary\\_x.htm](http://www.usatoday.com/news/health/2006-06-04-aids-anniversary_x.htm); Joe Wright, *Remembering the Early Days of “Gay Cancer”*, NPR (May 8, 2006), <http://www.npr.org/templates/story/story.php?storyId=5391495>.

37. Richard Littlejohn, *Spare us the ‘People’s Prostitute’ Thing*, DAILY MAIL (Dec. 18, 2006), <http://www.dailymail.co.uk/debate/columnists/article-423549/Littlejohn-Spare-Peoples-Prostitute-routine-.html>.

38. I don’t mean to suggest that othering operates universally; there clearly are exceptions. The Tsunami, for example, generated a tremendous charitable outpouring among Americans, despite the fact that it happened someplace a significant number of Americans probably couldn’t locate on a map. See Philip Rucker, *In U.S., A Multitude of Forces Drains the Spirit of Giving*, WASH. POST (May 23, 2008), [http://www.washingtonpost.com/wp-dyn/content/article/2008/05/22/AR2008052204116\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/05/22/AR2008052204116_pf.html) (noting that Americans donated \$207 million in the first five days after the Tsunami hit). And people from all around the country sent money and goods to New Orleans or traveled there themselves to help with the rebuilding after Hurricane Katrina. See *id.* (noting that Americans donated \$226 million in the five days after Hurricanes Katrina and Rita). It may be that natural disasters don’t so easily give rise to a response of othering: even though the victims of a particular natural disaster are different from us, we could as easily be the victim of a natural disaster ourselves so the victims are not inherently other. But, more broadly, it may be that charitable impulses are just different. That is, it may be that people are simply willing to give notwithstanding the othering of the recipient of our charity. One can write a check while still maintaining a distance from the other and while maintaining a sense of power and control over the other—not to mention getting a tax deduction for the act. In any event, even if one could find examples that suggest the othering tendency is not universal, it is clear that it exerts a strong pull on many people.

recently, the Black Lives Matter movement<sup>39</sup> is a response to the fact that crimes against blacks—including state violence against blacks—have failed to receive the attention they deserve.

## B. *Factors that Reinforce Our Othering Tendencies*

Apart from the natural process by which we identify ourselves by the groups of which we are a part, there are a number of forces that contribute to othering and that contribute to our devaluation of those we label as other. This Section addresses three important factors: religion, culture, and law.

### 1. *Religion and Othering*

Religious thought has a tremendous potential to promote a sense of communion and interrelatedness of human beings that is at odds with the othering I have been discussing.<sup>40</sup> Lamentably, religion has not always lived up to that potential, instead, often serving to promote an othering that devalues others.

Religion has far too often operated in the world as a means of dividing people. For many, the belief that their religion possesses a monopoly on truth has led to a need to denigrate those possessing different views. As we all know from our history, I am talking about more than merely unexpressed feelings of superiority. Instead, religious adherents have, over the years, zealously sought to advance their religion by violent and atrocious means. The Crusades were undertaken under the battle cry “Deus Vult” (God wills it) to destroy Jews and Moslems in the Holy Land.<sup>41</sup> Islamic jihadists, believing themselves mandated to do so by the Koran, have killed millions over the centuries.<sup>42</sup> In the 1900s, Muslim Turks waged genocide against Christian Armenians.<sup>43</sup> Our more recent history has included years of conflict in Northern Ireland between Protestants and Catholics,<sup>44</sup> ongoing violence between Arabs and Jews,<sup>45</sup> and the present violent activities of

39. See generally BLACK LIVES MATTER, <http://blacklivesmatter.com/> (last visited Sept. 20, 2015).

40. See *infra* text accompanying Section III.

41. JAMES MORWOOD, A DICTIONARY OF LATIN WORDS AND PHRASES 46 (1998).

42. Theodore Gabriel, *Ethical and Religious Traditions, Eastern*, in ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT 704–06 (Lester R. Kurtz ed., 2008).

43. See generally TANER AKCAM, A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY (2006).

44. See, e.g., William Borders, *Families Shift Homes in an Inflamed Ulster*, N.Y. TIMES, Sept. 30, 1981, at 11; James F. Clairity, *After Six Killings, the Old Sadness in Ulster: A Raid on a Pub by Protestant Gunmen is Widely Condemned*, N. Y. TIMES, June 20, 1994, at A3; *A Pregnant Catholic Woman is Shot Dead in Northern Ireland*, N.Y. TIMES, Aug. 8, 1994, at A2.

45. See, e.g., Marc D. Charney, *History Leaves the Talks a Bitter Tangle to Untie*, N.Y. TIMES, Oct. 27, 1991, at E2; Ibrahim Abu-Lughod, *Imagine a Palestinian State—The Dream: It Would be Democratic, Secular and at Peace*, N.Y. TIMES, Apr. 25, 1988, at A21.

the Islamic State of Iraq and al-Sham (ISIS).<sup>46</sup> Incredible death and barbaric behavior toward others, all in the name of religion. These are the things that lead people like Christopher Hitchens to claim that religion “has been an enormous multiplier of tribal suspicion and hatred”<sup>47</sup> that “*must* seek to interfere with the lives of nonbelievers, or heretics, or adherents of other faiths.”<sup>48</sup>

Left unchecked, many people will use religion as an excuse for othering. Even where it does not lead to violence, a fundamentalist approach to religion often leads to a lack of willingness to associate with others not of the same religion.<sup>49</sup> It is reflective of the desire of some religious groups to remain separate that a 1998 documentary on the life of Hasidic Jews in America—primarily in New York—was titled, *A Life Apart*.<sup>50</sup>

## 2. Contribution of Cultural Forces to Othering

Cultural forces can be very powerful in shaping our reactions. Much of our understanding of the meaning of concepts such as justice, truth, and freedom are a function of the culture that steeps our lives. As a result, cultural forces also contribute to “othering.” David Brooks wrote an op-ed in the New York Times several years ago titled “The Segmented Society.”<sup>51</sup> In it, he suggested that we “live in an age in which the technological and commercial momentum drives fragmentation.”<sup>52</sup> The particular example he explored was the fragmentation of the music industry and of the present musical culture’s loss of contact with its common roots. Music, however, is only one aspect of our increasing loss of cohesion and “in any given industry, companies are dividing the marketplace into narrower and more seg-

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46. See Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC, Mar. 2015 (describing the “medieval religious nature” of ISIS). Notwithstanding President Obama’s assertion that “ISIL is not ‘Islamic’” (see Ashley Killough, *Strong Reaction to Obama Statement*, CNN NEWS, Sept. 11, 2014, <http://www.cnn.com/2014/09/10/politics/obama-isil-not-islamic/>), it is clear that many Muslims believe there is an “imperative to wage jihad, or holy war.” ALI, *supra* note 27, at 24.

47. CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 36 (2007).

48. *Id.* at 17.

49. See KAREN ARMSTRONG, THE BATTLE FOR GOD, at xi (2000) (“[T]o avoid contamination, [fundamentalists] often withdraw from mainstream society to create a counterculture.”). Intended or not, that conveys the sense that those not of the religion in question are at a minimum other and worse, less valuable as human persons. In the words of one commentator, “[r]eligious fundamentalism is divisive. Instead of uniting societies, it produces isolation and hostility.” Darrell Williams, *Religious Fundamentalism Versus Tolerance*, AM. CHRON. (Oct. 10, 2007), <http://www.americanchronicle.com/articles/39850>. There is, of course, the danger of “othering” fundamentalists. As with other labels, the label *fundamentalist* is used as a way to distance those labeled from ourselves. It is a term that is almost always used pejoratively as a way of suggesting people who are dangerous, different, and not quite to be trusted and a term that is often applied incorrectly to anyone whose views seem too conservative or orthodox.

50. A LIFE APART: HASIDISM IN AMERICA (PBS 1998). You can find information on the film at <http://www.pbs.org/alifeapart/index.html>.

51. David Brooks, *The Segmented Society*, N.Y. TIMES, Nov. 20, 2007, at A23.

52. *Id.*

mented life-style niches.”<sup>53</sup> Brooks suggested that anxiety about fragmentation and a longing for cohesion are “the driving fear[s] behind the inequality and immigration debates, behind worries of polarization” and talks about the need for “institutions that span social, class, and ethnic lines.”<sup>54</sup> That segmentation has only increased in the years since Brooks wrote of it.

Nor is technology the only culprit here. Within the last few decades, the American ideal has shifted “from assimilation to ethnicity, from integration to separatism.”<sup>55</sup> We see examples of this in the efforts to embrace Ebonics in American classrooms and other educational policies fostering multiculturalism<sup>56</sup> as well as in strategies for integrating immigrants into American life.<sup>57</sup>

Obviously, cultural pluralism is “necessity in an ethnically diversified society,”<sup>58</sup> such as the one which exists in the United States today. Multiculturalism does not necessarily entail superiority of one group over another, and to the extent it takes the form of recognizing the value and contributions of each of the various subgroups that make up our culture, it is both valuable and necessary.<sup>59</sup>

However, there is a danger. Speaking in constitutional terms, Mark Tushnet wrote, “[i]n important ways the Constitution, with its opening words ‘We the People of the United States,’ is a document about national unity; a document that tries to create—at least through rhetoric—a single people of the United States, notwithstanding our wide differences. Certain kinds of multiculturalism deny the possibility that there could be a single

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53. *Id.*

54. *Id.*

55. ARTHUR M. SCHLESINGER JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 2 (1991). See Lawrence E. Harrison, *The End of Multiculturalism*, CHRISTIAN SCI. MONITOR (Feb. 26, 2008), <http://www.csmonitor.com/2008/0226/p09s01-coop.html> (observing that “multiculturalism has become a dominant feature of the political and intellectual landscape of the West” since the 1960s).

56. Ebonics is a language system characteristic of African Americans with roots in West Africa. It is sometimes also called Black English, Black Vernacular English or African-American Vernacular English. For a discussion of the Ebonics movement, see, for example, THERESA PERRY & LISA D. DELPIT, *THE REAL EBONICS DEBATE: POWER LANGUAGE, AND THE EDUCATION OF AFRICAN AMERICAN CHILDREN* (1998); JOHN RICKFORD, *AFRICAN AMERICAN VERNACULAR ENGLISH: FEATURES AND USE, EVOLUTION AND EDUCATIONAL IMPLICATIONS* (1999).

57. See VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2004) (discussing move from assimilation to multiculturalism model for integrating immigrants and downsides of the shift).

58. SCHLESINGER, *supra* note 55, at 40.

59. Thus, for example, a “multicultural curriculum [that] features Africa and African achievements . . . teach[es] some of the wonders of human achievement and substantiate the truth about innate black equality.” Maurice E.R. Munroe, *Unamerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241, 305–06 (2000).

people of the United States.”<sup>60</sup> Thus, multiculturalism has the potential to foster a separatism that “corrodes all sense of community.”<sup>61</sup>

### 3. *The Reinforcement Effect of Law and Politics*

The law also plays a tremendous role in promoting othering. Law does more than simply regulate behavior. It also has both an expressive and pedagogic function.<sup>62</sup> Whatever else it does, the law “imbues a vision of how the members of a particular society should live their lives together.”<sup>63</sup>

By “law,” I mean not simply legislative enactments and judicial decisions, but also both the behavior of executive officials and those charged with enforcing the law and the expression of views by other government officials about how law and society should function. Not only does positively enacted legislation have the potential to institutionalize pseudo-speciation, but judicial decisions and the behavior of individual government officials often proceed from an attitude of othering and effectively legitimize such behavior, expressing to the citizenry that some people can be disregarded.

Several examples illustrate the potential of legislative and judicial law to legitimate othering. First, the internment of Japanese-Americans during World War II was effected pursuant to congressional legislation. That legislation was upheld by the Supreme Court in *Korematsu v. United States*.<sup>64</sup> In the words of Justice Roberts, who dissented from the majority opinion in *Korematsu*, the Supreme Court upheld the conviction of “a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence of inquiry concerning his loyalty and good disposition towards the United

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60. Mark Tushnet, *Thinking about the Constitution at the Cusp*, 34 AKRON L. REV. 21, 34 (2000); see also SCHLESINGER, *supra* note 55, at 58 (noting that “[t]he cult of ethnicity exaggerates differences, intensifies resentments and antagonisms, drives ever deeper the awful wedges between races and nationalities”).

61. George W. Dent Jr., *Secularism and the Supreme Court*, BYU. L. REV. 1, 36–37 (1999) (arguing that “[s]ocial rifts are deepened by multiculturalism, a theory that people should find meaning in their identity, which derives from sex, ethnicity, and sexual orientation”); see also Ayelet Schachar, *Two Critiques of Multiculturalism*, 23 CARDOZO L. REV. 253, 259 (2001) (discussing “external” critique of multiculturalism, citing critics who worry that multiculturalism has the potential to “harden[] cultural identities into political categories”).

62. Rick Garnett spoke of the expressive and pedagogic function of the law in a 2007 colloquy on the Mirror of Justice weblog in the context of a discussion on the effect of a law subsidizing contraceptive use by college students. See Rick Garnett, *Response to Michael*, MIRROR OF JUSTICE (Nov. 25, 2007), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2007/11/response-to-mic.html>; Rick Garnett, *Explaining My No*, MIRROR OF JUSTICE (Nov. 24, 2007), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2007/11/explaining-my-n.html> (“[L]aw has not only a direct social-control function but also ‘expressive’ and ‘pedagogical’ functions and effects.”).

63. M. Cathleen Kaveny, *Autonomy, Solidarity and Law’s Pedagogy*, 27 LOUVAIN STUD. 339, 341, 350 (2002). See *infra* Section IV.B for a further discussion of the pedagogical function of the law.

64. *Korematsu v. United States*, 323 U.S. 214 (1944).

States.”<sup>65</sup> Justice Murphy, in his dissenting opinion, made reference to the government’s “blanket condemnation of all persons of Japanese descent” with no evidence that such individuals were disloyal or had conducted themselves so as to constitute any menace to U.S. interests. He cited language in the military’s report on the evacuation of the Pacific Coast area referring “to all individuals of Japanese descent as ‘subversive,’ [and] as belonging to ‘an enemy race’ whose ‘racial strains are undiluted.’”<sup>66</sup> The action of the legislature, the military, and the judiciary legitimated the treatment of all Japanese-Americans as “other” and, therefore, as not entitled to the consideration we would demand for ourselves. The legal behavior constituted, in the words of Justice Murphy, the “legalization of racism.”<sup>67</sup> The government does the same thing today when it approves of the use of torture and otherwise inhumane treatment of Muslim detainees in the name of fighting a war against terrorism.<sup>68</sup>

A second example is provided by Cathleen Kaveny in an article in which she discusses the pedagogical function of the law.<sup>69</sup> She discusses laws colloquially referred to as the “Ugly Law,” statutes that existed in a number of states until the early 1970s that prohibited those who were “diseased, maimed, mutilated or in any [way visibly] deformed” to appear in public places or on the public streets.<sup>70</sup> It is not just that such laws had an effect on the activities of disabled persons on the streets. The bigger concern, notes Kaveny, is the message sent by the law. The law’s “concrete prohibitions and penalties are infused with a morally freighted vision of how human beings should live their lives together.”<sup>71</sup> And the effect of the law extends beyond the actual prohibitions.<sup>72</sup> “Assuming the citizens of Chicago internalize the normative vision of the worth of persons with disabilities presupposed by the law, how will they act in contexts not explicitly governed by it?”<sup>73</sup> The law will clearly affect how people relate to persons with disabilities in whatever environment they confront them.

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65. *Id.* at 226 (Roberts, J., dissenting).

66. *Id.* at 236 (Murphy, J., dissenting).

67. *Id.* at 242 (Murphy, J., dissenting).

68. *U.S. Senate Report Slams CIA Torture, Lies*, HUMAN RIGHTS WATCH (Dec. 10, 2014), <https://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>; *United States of America, A Case to Answer: From Abu Ghraib to Secret CIA Custody*, AMNESTY INT’L USA (Mar. 2008), <http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR510132008>.

69. See Kaveny, *supra* note 63.

70. *Id.* (citing CHICAGO, ILL., CODE § 36034 (repealed 1974)).

71. *Id.* at 340.

72. See Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 955 (2007) (arguing that “[m]ajority views regarding disabilities often reflect the able-bodieds’ misperceptions and stereotypes about the experiences of the disabled, in large part, because of lack of experience with the disabled community.”); James A. Long, Note, *Genetic Plastic Surgery: How Neoeugenics Creates a Culture of Stage Moms*, 7 U. ST. THOMAS L.J. 209 (2009) (demonstrating how American sterilization and marriage prohibition laws fueled the Holocaust).

73. Kaveny, *supra* note 63, at 340.

The language and behavior of government officials also contributes to othering. Think back, for example, to the long and arduous struggle to integrate schools—a struggle that in many respects is still going on. De facto school segregation continued to exist for years after the 1954 Supreme Court decision in *Brown v. Board of Education*.<sup>74</sup> It continued because in people's hearts and minds, African-American persons were "other"; they were dehumanized based on the color of their skin.<sup>75</sup> And that othering was fostered by the acts of executive officials in the South.<sup>76</sup> George Wallace vowed in his first inaugural address as Governor of Alabama, "[s]egregation today . . . segregation tomorrow . . . segregation forever."<sup>77</sup> He pledged to "stand in the schoolhouse door"<sup>78</sup> to prevent school integration and did exactly that. Think of what a powerful image that was—the Governor of the state standing at the door of a University of Alabama building, blocking the passage of two students of color.<sup>79</sup> The Governor of the state, signifying to the people of Alabama that, those two students are not us; they don't belong with us.

Another example is the behavior of Hillary Clinton during the campaign to determine the Democratic nominee for President in the 2008 election. Behind in delegates, the perception of many people was that Clinton adopted a campaign strategy that suggested a black man could not win the presidency. As characterized by one party leader, "[s]he is saying, 'he's not

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74. See *Brown v. Board of Education*, 347 U.S. 483 (1954); see also Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675 n.107 (2008) (acknowledging that de facto segregation of schools continued through the 1980s and 1990s).

75. See, e.g., Phillip Goff, Jennifer Eberhardt, Melissa Williams & Matthew Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization and Contemporary Consequences*, 94 J. OF PERSONALITY AND SOC. PSYCHOL. 292–93 (2008) (discussing dehumanizing effect of implicit association of African-Americans with apes). Such attitudes continue to this day: race "is the single most important predictor of support for welfare" because "in America programs that help the needy are all too often seen as programs that help Those People." Paul Krugman, *Slavery's Long Shadow*, N. Y. TIMES, June 22, 2015, at A17.

76. Prior to the Civil War and the subsequent enactment of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, the othering of African-Americans was promoted by the law itself. "To put it bluntly," in the words of John Noonan, "law was the medium and lawyers were the agents responsible for turning one class of human beings into property." See Noonan, *supra* note 10, at 669–71 (discussing early court decisions addressing the status of slaves).

77. George C. Wallace, Governor of Alabama, 1963 Inaugural Address (Jan. 14, 1963). Interestingly, almost lost to history is the fact that Wallace first ran as a pro-integration candidate, a position he discarded after losing the governor's race. More significantly, also lost is the fact that while he was governor, Wallace invested heavily in education and health care programs for blacks and established free clinics and vocational schools that helped black and other low-income residents of his state.

78. See Governor George C. Wallace, Statement and Proclamation at the University of Alabama (June 11, 1963). This speech became widely known as the "stand in the schoolhouse door" speech.

79. To view a photograph and accompanying account of Wallace giving his infamous speech in the schoolhouse door, see Jay Reeves, *A Changed Alabama Remembers '63*, CBSNEWS.COM (June 11, 2003), <http://www.cbsnews.com/stories/2003/06/11/national/main558016.shtml>.

one of us.’”<sup>80</sup> The fear was expressed that Clinton’s statements “encourage[d] a sense that we are divided as a nation.”<sup>81</sup> Again, this may or may not have been her intent, but it is what was conveyed.

All of these things legitimate uncaring attitudes about the poor, about racial minorities, about criminals. All in various ways involve the law and legal officials not only condoning, but in some sense, fostering an attitude that some people are worth less than others, that some people can be at best ignored and at worst mistreated.

## II. EFFECTS OF OTHERING ON ISSUES OF LAW AND PUBLIC POLICY

I think there is very little question that this “othering” of which I speak affects both our perception of many public policy problems and our evaluation of solutions to those problems. Although this is true on any number of issues,<sup>82</sup> this Section selects several for purposes of illustration.<sup>83</sup>

The first is criminal law. There is a tendency to view people who break the law and who are jailed for doing so as irrevocably other. Whatever may have been their status before committing their crimes—and, in reality, a significant number were already “other” on racial or economic grounds before they engaged in any act in violation of the law—once convicted and labeled “criminals,” they cease to be us. And they cease to matter in the same way they would if they were us.

Sr. Helen Prejean—famous from her book *Dead Man Walking*<sup>84</sup> and for her efforts to secure a moratorium on the death penalty—believes that our society only allows the death penalty because we don’t believe that those who live on death row are human like us. They become so different from us that we don’t even recognize them as a human being. People, in fact, sometimes argue that certain criminals have forfeited their humanity

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80. Peggy Noonan, *Damsel of Distress*, WALL STREET J., Feb. 9, 2008, at A11.

81. *Id.*

82. In addition to the three examples I discuss in the text, what comes to mind immediately is the NIMBY (not-in-my-backyard) reaction to residents of a particular area when it is proposed that a halfway house or a home for developmentally disabled adults be built in the neighborhood. See, e.g., Sam Verhovek, *Neighbors Now More Likely to Oppose Jails and Shelters*, N.Y. TIMES (Apr. 23, 1987), <http://query.nytimes.com/gst/fullpage.html?res=9B0DEFDA1531F930A15757C0A961948260>; Shawn Reeves, *Facing F.E.A.R.*, HABITAT WORLD (June/July 2004), <http://www.habitat.org/hw/june-july04/feature2.html>. Although the term “NIMBY” once referred to opposition to a narrowly defined class of uses that arguably constituted a threat to property value, “in wealthy communities across the New York region, the pitched battles are now over ball fields and libraries, school buildings, churches and housing for the elderly—projects once seen as pillars of an upright community.” David Herszenhorn, *Now It’s ‘Nothing in My Backyard’; Just About any Kind of Project Can Rile Homeowners*, N.Y. TIMES (Apr. 16, 2000), <http://query.nytimes.com/gst/fullpage.html?res=9E06EEDF1731F935A25757C0A9669C8B63>.

83. In Section I.B.3, *supra*, I gave examples of how existing laws affect people’s views. Here my focus is on how othering affects our perception of legislative or other public policy proposals.

84. SR. HELEN PREJEAN, C.S.J., *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).



by the crimes they commit.<sup>85</sup> Certainly support for the death penalty is not expressed in those terms; people manage to frame support for the death penalty in terms of deterrence, self-protection, or retribution.<sup>86</sup> However one frames the justification, the reality is that the criminal to whom the death penalty is given is viewed as not us.

Nor is this attitude limited to death row inmates, so it has impact beyond the death penalty policies and laws. Ask yourself why there is so little emphasis on and effort put into the reentry into our society of those who have served their time in prison. According to the website of the Office of Justice Programs of the U.S. Department of Justice, approximately 650,000 state and federal prisoners reenter society each year.<sup>87</sup> When they do, they face tremendous obstacles, including difficulty finding housing and employment, as well as health and substance abuse problems.<sup>88</sup> Without help in handling those problems, they will be—and are—rearrested and reimprisoned, creating a vicious cycle.<sup>89</sup>

To be sure, there are some programs aimed at assisting reentering inmates, but there are far too few.<sup>90</sup> This means, in the words of one Urban Institute report, that “an increasing number of prisoners are returning home, having spent longer terms behind bars, less prepared for life on the outside, with less assistance in their reintegration and, at best, strained connections to their families and communities.”<sup>91</sup>

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85. See, e.g., *The Modern View of Capital Punishment: The Honorable Alex Kozinski vs. Professor Stephen Bright*, 34 AM. CRIM. L. REV. 1353, 1355 (1997) (quoting as summation of sentiment shared by many who support capital punishment that “it is entirely appropriate for society to deem some acts so evil, to be so demeaning of human life, that we can say the perpetrator has forfeited his own life by committing them”).

86. There are a plethora of scholarly journals discussing the various justifications for the imposition of the death penalty. For some examples, see Jason Borenstein, *The Death Penalty: Conceptual and Empirical Issues*, 2 CARDOZO PU. L. POL’Y & ETH. J. 377 (2004); Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283 (2006); David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence? An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1 (2009).

87. See *Prisoners and Prisoner Re-Entry*, U.S. DEPT OF JUSTICE, [http://www.justice.gov/archive/fbci/progmnu\\_reentry.html](http://www.justice.gov/archive/fbci/progmnu_reentry.html) (last visited Sept. 23, 2015).

88. Amy L. Solomon et al., *Outside the Walls: A National Snapshot of Community-Based Prisoner Reentry Programs*, URB. INST., 12–16, 49–54, 81–84 (2004), [http://www.urban.org/UploadedPDF/410911\\_OTWResourceGuide.pdf](http://www.urban.org/UploadedPDF/410911_OTWResourceGuide.pdf) [hereinafter *Outside the Walls*]; Amy L. Solomon et al., *Understanding the Challenges of Prisoner Reentry*, URB. INST. (2006), <http://www.urban.org/publications/411289.html> [hereinafter *Understanding the Challenges*].

89. See *Outside the Walls*, *supra* note 88, at 128–30.

90. See *id.* at 132–62.

91. Michelle Waul et al., *Background Paper: The Effect of Incarceration and Reentry on Children, Families, and Communities* (U.S. Dep’t of Health and Human Serv., Working Paper, No. NCJ 207444, 2002).

Why are there far too few? Although by no means a complete answer,<sup>92</sup> I think part of the explanation may be that the view of far too many people is that “they,” those who commit crimes, deserve to be punished. It is not uncommon to hear some version of, “[I]ock them up and throw away the key.”<sup>93</sup> There is very little focus on what happens to prisoners on the back end because they have ceased to be us.<sup>94</sup>

A second example relates to American “othering” of those from other countries. In Section I, I talked about our reactions to atrocities or poor conditions in other countries. We think very differently about Americans than we do about non-Americans. This plays out in different ways. As a practical reality, globalization has meant the global spread of unrestrained capitalism. It has translated into larger and more powerful multinational corporations with increasing power to impose their will on a broader range of persons, which almost inevitably means more for the haves and even less for the have nots. Globalization has translated into trade policies by the governments of the industrialized nations that artificially protect their own producers at the expense of those of developing nations.<sup>95</sup> Even worse, globalization sometimes also includes U.S. corporations profiting from human rights abuses committed by foreign government entities.<sup>96</sup> These aspects of globalization have sometimes been referred to as “economic imperialism.”<sup>97</sup>

Our view of this activity is very much dependent on our vision of the human person. If “us” is the community of persons living in the United

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92. Doubtless, the difficulty of re-integration also plays a role here. It takes a lot of energy and effort to build community with those who have been imprisoned, especially where addictions and mental illness play some role in their criminal behavior.

93. Read the Letters to the Editor section of any newspaper after a crime that has received a lot of publicity and you will see expressions of such attitudes. *See, e.g., Death Penalty: Punishment of Worse Criminals Should Fit the Crime*, SEATTLE TIMES (June 2, 2015), <http://www.seattletimes.com/opinion/letters-to-the-editor/death-penalty-punishment-of-worst-criminals-should-fit-the-crime/> (“dangerous monsters . . . must be permanently removed”). *See also* DEE COOK, CRIMINAL AND SOCIAL JUSTICE 169 (2006) (discussing othering of criminals).

94. I think this also explains why the United States has such restrictive felon disenfranchisement laws; 35% of ex-felons in this country are permanently disenfranchised. *See generally* Christopher Uggen, *Barriers to Democratic Participation* 1–2 (Urb. Inst., Working Paper No. 410801, 2002).

95. *See* Mary Durran, *In World Trade, Cotton Fields Aren’t Level; Global Trade Meeting Fails African Farmers*, NAT’L CATH. REP., Oct. 10, 2003, at 4 (discussing \$3 billion in subsidies paid to American cotton farmers, resulting in their ability to flood the world market with inexpensive cotton, preventing “West African farmers from competing even in their own domestic market.”).

96. *See, e.g.,* Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 892 n.213 (2004) (giving examples of connection between American corporations and human rights abuses abroad).

97. Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT’L LAW 121, 132–33 (2002) (calling “detrimental globalization” an economic imperialism that “uses globalization as a bulldozer to crush resistance for the achievement of [the goals of eradication of all borders so that the same products and services dominate all markets] by the multinational corporations, which are the progenitors of economic imperialism”).

States and we “other” those in the third world, we feel perfectly justified in protecting American businesses at the expense of those in developing countries. We lack a “global culture of solidarity attentive to the needs of the weakest”<sup>98</sup> and instead think of only parochial interests.<sup>99</sup>

We see the same effect of this lack of a global culture of solidarity in our discussions about immigration reform. Advocating restrictive immigration policies at the same time that we exploit illegal workers in this country represents the same kind of othering—those trying to get in are not us.<sup>100</sup>

One can find numerous other examples of how othering affects the discourse over issues of law and public policy including the discourse of feminist legal theory,<sup>101</sup> the discourse of abortion,<sup>102</sup> NIMBY efforts to use

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98. Pope John Paul II, Address of John Paul II to the Members of the Vatican Foundation “*Centesimus Annus – Pro Pontifice*” (May 9, 1998), [https://w2.vatican.va/content/john-paul-ii/en/speeches/1998/may/documents/hf\\_jp-ii\\_spe\\_09051998\\_fondazione-cent-annus.html](https://w2.vatican.va/content/john-paul-ii/en/speeches/1998/may/documents/hf_jp-ii_spe_09051998_fondazione-cent-annus.html).

99. Some might suggest that it is not necessarily othering that produces this effect, arguing that it may simply be that people find no time or inclination to care about things that happen far away. There are more pressing issues closer to home. First, the issues closer to home are more pressing to us precisely because of othering; the people nearer are more like us. Second, Americans don’t react the same way to things far off. There is much greater American reaction to, and concern for, problems in Europe than those in Africa or Asia. Why? Because when we look at Europeans we see people that are more like us than are Asians and Africans.

100. See Kristin E. Heyer, *Welcoming the Stranger: What Christian Faith Can Bring to the Immigration Debate*, AMERICA, Oct. 13, 2008, at 24 (talking about how immigrants are scapegoats for many social ills and how media and political rhetoric of immigrants “encourages xenophobia or ethno-cultural nationalism”; also discussing the juxtaposition of demonizing and scapegoating of immigrants even as we “gladly accept the sweat and taxes they provide”).

101. In more general terms, the discourse of feminist legal theory provides another example of how othering affects legal discourse. Some feminists have, at times, expressed concern over approaches to gender discrimination that seek different treatment for women. “Advocates of the ‘equal treatment’ position argue that women should strive for sex-neutral standards that deemphasize differences between the sexes.” Maxine N. Eichner, *Getting Women’s Work that Isn’t Women’s Work*, 97 YALE L. J. 1397, 1399 n.8 (1988). See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy*, in KELLY WEISBERG, *FEMINIST LEGAL THEORY: FOUNDATIONS* 156 (1993) (discussing differences among feminist theorists about meaning of equality). The concern is that any difference in treatment, even if it favored women (such as for example, imposing different weight and strength requirements for police officers), would ultimately lead to exclusion and subordination. See, e.g., Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER, SOC. POL’Y & LAW 13, 15–16 (2005) (citing concern of some feminist scholars that “any recognition of difference or argument for ‘special treatment’ would operate to the disadvantage of women”). This may reflect the sense that “[t]he history of gender discrimination in the United States is littered with cases of ‘protective’ legislation and policies that, in reality, served primarily to limit the rights and opportunities of women.” Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 22 (1995). Difference in treatment would make women other and, therefore, ultimately vulnerable to the forces of othering.

102. Although for some, the belief that human life begins at conception is a matter of religious faith, that belief is supported by the fact that “at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A being with a genetic code is man.” John T. Noonan, Jr., *An Almost Absolute Value in History*, in CONTEMP. ISSUES IN BIOETHICS 281 (Tom L. Beauchamp & LeRoy Walters eds., 4th ed. 1994). More recent DNA evidence about prenatal biology supports this view of the fetus as a “living, unique human being.” *Standing for the Unborn: A Statement of the Society of Jesus in the United States on*

zoning laws and other means to challenge the construction of facilities to house those with mental illnesses,<sup>103</sup> and our conversations about poverty.<sup>104</sup>

### III. A COMMUNAL VISION OF THE HUMAN PERSON AND HUMAN RELATIONS

In some of my earlier writing I have discussed religion as a force with the potential<sup>105</sup> to promote a sense of communion and interrelatedness of human beings.<sup>106</sup> Here, I want to focus particularly on the vision of the human person and of human relations articulated by Catholic Social Thought, although I will suggest this vision is not wholly unique to Catholicism and strands of it appear in other major world religions as well. This Section discusses three principles or values deeply imbedded in Catholic thought that promote a view of the human person and of human relations that I will argue should both be promoted by the law and should serve as the basis for our public policy decisions; principles that are antithetical to othering.

#### A. Dignity of Human Person

The dignity of the human person is one of the most fundamental principles of Catholic Social Thought.<sup>107</sup> In his first encyclical, *Redemptor*

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*Abortion*, AMERICA, June 2, 2003, at 19–20. Even if one wants to argue that what exists at conception is only the potential for life, the fact that we need to pass legislation called the Born-Alive Infants Protection Act to force hospitals to provide medical care to infants who come through the abortion process alive suggests the extent to which othering operates here. Born-Alive Infants Protection Act of 2002, 1 U.S.C. § 8. The statute defines “born alive” as “the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.” *Id.* § 8(b).

103. See generally, Anna L. Georgiou, *NIMBY's Legacy—A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209, 209–11 (1999).

104. Think of the complete inability of John Edwards to “gain traction in his bid for the Democratic presidential nomination” in 2008, a bid that was largely built on his passion for addressing poverty. Matthew Bigg, *Edwards Bid Shows Poverty Not Big Campaign Theme*, REUTERS (Jan. 30, 2008), <http://www.reuters.com/article/topNews/idUSN3024268420080130>. When Edwards kicked off the Half in Ten campaign with a speech on May 12, 2008, only one major newspaper even covered the event. Peter Dreier, *Edwards Poverty Campaign Met with Media Blackout*, THE HUFFINGTON POST (May 16, 2008), [http://www.huffingtonpost.com/peter-dreier/edwards-poverty-campaign\\_b\\_101853.html](http://www.huffingtonpost.com/peter-dreier/edwards-poverty-campaign_b_101853.html).

105. I speak of “potential” because religion has, in many instances, been a factor contributing to othering, as I discuss in Section I.B.1, *supra*.

106. See, e.g., Susan J. Stabile, *Workers in the Vineyard: Catholic Social Thought and the Workplace*, 6 J. OF CATH. SOC. THOUGHT 371, 410 (2008); Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181, 202 (2005); Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 847–78 (2004).

107. See SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *Gaudium et Spes* ¶ 26 (Dec. 7, 1965), <http://www.vatican.va/archive/>

*Hominis*,<sup>108</sup> Pope Saint John Paul II said that Christianity is an attitude of “deep amazement” at the worth and dignity of the human person.<sup>109</sup>

The conviction of the dignity of the human person that animates Catholic thought does not stem from any particular talent, fortune, or ambition of the individual, or from one’s being born to any particular race, religion, ethnicity, or gender. It stems, rather, from the fundamental tenet of the Catholic faith, that all humans are created in the image and likeness of God.<sup>110</sup> In *Mulieris Dignitatem*,<sup>111</sup> Pope Saint John Paul II wrote that:

[T]he human race, which takes its origin from the calling into existence of man and woman, crowns the whole work of creation; *both man and woman are human beings to an equal degree*, both are created *in God’s image*. This image and likeness of God, which is essential for the human being, is passed on by the man and woman, as spouses and parents, to their descendants: “Be fruitful and multiply, and fill the earth and subdue it” . . . The Creator entrusts dominion over the earth to the human race, to all persons, to all men and women, who derive their dignity and vocation from the common beginning.<sup>112</sup>

Our dignity as human persons, then, comes from God. It is rooted in the mystery of creation and the creation of each of us in God’s image implies that we are each sacred and precious and invested with a dignity that requires equality of treatment. Being created “in the image and likeness” of God, all humans partake of a divine nature. In the words of Saint Paul, “[t]here is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for you are all one.”<sup>113</sup> God wills each one of us

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hist\_councils/ii\_vatican\_council/documents/vat-ii\_const\_19651207\_gaudium-et-spes\_en.html [hereinafter *Gaudium et Spes*].

108. John Paul II, Encyclical Letter on the Redeemer of Man, *Redemptor Hominis* (1979), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redeemptor-hominis.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_04031979_redeemptor-hominis.html) [hereinafter *Redemptor Hominis*].

109. *Id.* ¶ 10 (“In reality, the name for that deep amazement at man’s worth and dignity is the Gospel, that is to say: the Good News. It is also called Christianity.”). That dignity is not created by Christ; rather, Christ’s redemptive act restores “dignity to man and given back meaning to his life in the world, a meaning that was lost to a considerable extent because of sin.” *Id.*

110. See CATECHISM OF THE CATHOLIC CHURCH ¶ 1934 (2d ed. 1997) (“Created in the image of the one God and equally endowed with rational souls, all men have the same nature and the same origin. Redeemed by the sacrifice of Christ, all are called to participate in the same divine beatitude: all therefore enjoy an equal dignity.”); PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 105 (2004) [hereinafter *COMPENDIUM*] (in every person there exists “the living image of God”); *Genesis* 1:26–27.

111. John Paul II, Apostolic Letter on the Dignity and the Vocation of Women, *Mulieris Dignitatem* (1988), [http://w2.vatican.va/content/john-paul-ii/en/apost\\_letters/1988/documents/hf\\_jp-ii\\_apl\\_19880815\\_mulieris-dignitatem.html](http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1988/documents/hf_jp-ii_apl_19880815_mulieris-dignitatem.html) [hereinafter *Mulieris Dignitatem*].

112. *Id.* ¶ 6.

113. *Galatians* 3:28–29.

into existence with love and God looks at each one of us and sees that we are good.<sup>114</sup>

Not only are we created in God's image, but this God who created us in love dwells within us. Saint Ignatius' *Contemplatio ad amorem* (the Contemplation to Attain Love)<sup>115</sup> is an invitation to consider:

[H]ow God dwells in creatures: in the elements, giving them existence; in the plants[,] giving them life; in the animals, conferring upon them sensation, in [humans,] bestowing understanding. So He dwells in me and gives me being, life, sensation, intelligence; and makes a temple of me, since I am created in the likeness and image of the Divine Majesty.<sup>116</sup>

If God dwells in me, then God so dwells in each human being. By this indwelling, "God transforms every 'human life into that which is sacred.' Indeed, every human life . . . is a temple, 'a dwelling-place of God.'"<sup>117</sup>

Every human life is sacred. Every human being is a temple, a dwelling-place of God. Our eyes may see black, Asian, Hindu, Muslim, homosexual, but we need to understand that what defines us as human beings is the presence of God dwelling in each of us.<sup>118</sup>

Not surprisingly, given its origins in human creation in the image of God, Judaism has a similar notion of the dignity of the human person. Common in the words of the Old Testament prophets is "the conviction that every human being, simply by virtue of his or her humanity, is a child of God and therefore in possession of rights that even kings must respect."<sup>119</sup> Islam has the same recognition of the divine origin of humanity, entitling everyone to respect.<sup>120</sup>

It is easy to see the value of cultivating this kind of attitude. If we fail to see the dignity of the human person, if we cannot recognize the equal moral worth of all human organisms, it is easier to rationalize assigning less worth to some subset of humans than to others. "[W]hen we fail to recognize that human dignity is universal and carries with it certain inalienable rights," our tendency is to "demonize others."<sup>121</sup> We will rationalize as-

114. See *Genesis* 1:1–31 (stating that God looks at everything he makes and "finds it very good.")

115. The *Contemplatio* is part of the Spiritual Exercises of St. Ignatius. See IGNATIUS OF LOYOLA, *SPIRITUAL EXERCISES OF ST. IGNATIUS OF LOYOLA* ¶ 230–37 (Louis J. Puhl transl., 1968) [hereinafter *SPIRITUAL EXERCISES*]. For a fuller description of the *Contemplatio*, see MICHAEL J. BUCKLEY, S.J., *THE CATHOLIC UNIVERSITY AS PROMISE AND PROJECT: REFLECTIONS IN A JESUIT IDIOM* 81–84 (1998) and Gregory A. Kalscheur, S.J., *Ignatian Spirituality and the Life of the Lawyer: Finding God in All Things – Even in the Ordinary Practice of the Law*, 46 J. CATH. LEG. STUD. 7, 18–21 (2007).

116. *SPIRITUAL EXERCISES*, *supra* note 115, ¶ 235.

117. Kalscheur, *supra* note 115, at 12 (quoting BUCKLEY, *supra* note 115, at 82).

118. BUCKLEY, *supra* note 115, at 82.

119. HUSTON SMITH, *THE WORLD'S RELIGIONS* 292 (1991).

120. *Id.* at 239.

121. See George M. Anderson, *Roots of Genocide*, AMERICA, Feb. 9, 2009, at 16, 19.

signing less worth to some subset of beings in order for us to exert power over them in the name of some other real or imagined good. Such rationalization is impossible if we see the inherent dignity of the human person.<sup>122</sup>

## B. Solidarity

David Hollenbach has suggested that “a revival of commitment to the common good and a deeper sense of solidarity are preconditions for significant improvements in the lives of the poor.”<sup>123</sup> He might just as well have said that solidarity is a precondition for significant improvement in the lives of all of those who are marginalized and “othered.”

The principle of solidarity recognizes that a basic element of human existence is interdependence and relationship; living as human means living in community.<sup>124</sup> Solidarity reminds us of our relationship with other members of our human family, i.e., that all are our neighbors, entitled to share in the “banquet of life to which all are equally invited by God.”<sup>125</sup> In *Pacem in Terris*, Pope Saint John XXIII spoke of a “worldwide fellowship” of persons.<sup>126</sup> As expressed by Pope Saint John Paul II, solidarity “is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a *firm and persevering determination* to commit oneself to the common good; that is to say to the good of all and of each individual, because we are *all* really responsible for all.”<sup>127</sup>

122. See Damian P. Fedoryka, *The Concept of ‘Gift’ as Hermeneutical Key to the Dignity of the Human Person*, 11 LOGOS 49, 62 (2008) (“Only to the extent that we see that ontological preciousness and beauty of human beings that are their birthright prior to race, creed, ethnic origin, accident of birth, or accomplishment in life can we receive them and in doing so affirm them.”).

123. DAVID HOLLENBACH, *THE COMMON GOOD AND CHRISTIAN ETHICS* 173 (2002).

124. See Susan J. Stabile, *CST 101: Basic Principles of Catholic Social Thought*, 27 REVIEW OF BUS. 7, 10–11 (2006) (describing generally the principle of solidarity); Susan J. Stabile, *Catholic Legal Theory*, 44 ST. JOHN’S J. OF CATH. LEG. STUDIES 421, 424–25 (2005) (discussing indispensability of community to the flourishing of the human person); COMPENDIUM, *supra* note 110, ¶ 192.

125. Pope John Paul II, Encyclical Letter on Social Concern, *Sollicitudo Rei Socialis* ¶ 39 (Dec. 30, 1987), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html) [hereinafter *Sollicitudo Rei Socialis*]. In the words of Thomas Massaro, “to invoke the virtue of solidarity as a central value of ethical life is to call new attention to the relations among individuals. In order to be truly morally good, these relationships must be characterized by mutual concern for the well-being of others and by a willingness to make necessary sacrifices for the common good of the human community as a whole.” THOMAS MASSARO, S.J. CATHOLIC SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 8–9 (1998), describing solidarity as “a regulative norm for judging the working of social institutions”).

126. John XXIII, Encyclical Letter on Peace on Earth, *Pacem in Terris* ¶ 25 (1963), [http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html) [hereinafter *Pacem in Terris*].

127. *Sollicitudo Rei Socialis*, *supra* note 125, ¶ 38. The virtue of solidarity is derived from the recognition of interdependence among individuals and nations. *Id.*; see also Vatican Press Release, *Solidarity and Subsidiarity to Overcome Social Exclusion*, Feb. 6, 2009, <http://212.77.1.245/>

Buddhists do not use the term solidarity. However, the Dalai Lama speaks of the interdependence of all beings as a “fundamental law of nature”<sup>128</sup> and Mahayana Buddhism, in particular, places significant emphasis on overcoming the delusion of a separate self and of developing an attitude of cherishing others over the self.<sup>129</sup> It also encourages development of an attitude of “equal concern, equal regard, for everyone, . . . [one that sees] that our present discrimination is based on arbitrary, mistaken and very changeable labels.”<sup>130</sup> The same wholehearted giving of the self is found in the Islamic faith as well.<sup>131</sup>

Similarly, although the term solidarity may not be used within the Jewish religion as a term of art as it is in the Catholic tradition, Judaism shares a belief in the “interconnectedness of all life.”<sup>132</sup> Martin Buber suggested that fulfillment is possible only in true community, in the “unity of the human community in the sight of God.”<sup>133</sup> This translates in various ways into a concern for others and there has been recent emphasis by some progressive Jewish groups on an understanding of the term “kosher” as involving more than merely food preparation and extending to how we treat those who are traditionally “othered.”<sup>134</sup>

### C. *Family as the Paradigm for Human Relationship*

In Catholic thought, the family is indispensable to the promotion of the conditions necessary for the flourishing of the human person.<sup>135</sup> That is because it is in the family that we get our first revelation of our interconnectedness as humans, learning that we are “not born as isolated, autonomous monads, but rather as a precious part of a social unit.”<sup>136</sup>

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news\_services/press/vis/dinamiche/d0\_en.htm (quoting Archbishop Celestino Migliore on the “logic of solidarity” as a means of ensuring well-being of all persons and social groups).

128. TENZIN GYATSO THE FOURTEENTH DALAI LAMA, COMPASSION AND THE INDIVIDUAL 5 (1991).

129. See DALAI LAMA, THE EIGHT VERSES OF THOUGHT TRANSFORMATION (Alex Berzin trans., Nicholas Ribush ed., 1982), <http://www.lamayeshe.com/otherteachers/hhdl/8verses.shtml>; Shosen Miyamoto, *Freedom, Independence, and Peace in Buddhism*, 1 PHILOSOPHY EAST AND WEST 34 (Jan. 1952).

130. KATHLEEN McDONALD, HOW TO MEDITATE 93 (1984).

131. HUSTON SMITH, THE WORLD’S RELIGIONS 239 (1991).

132. See, e.g., Ted Falcon, *Life at Its Highest*, REFORM JUDAISM, Summer 2003, at 11, 13, 15.

133. MAURICE S. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE 144 (1955) (quoting Martin Buber, ‘*Der Chazul und seine Welt*’[*Auf Einer Redel*], in ALMANACH DES SCHOKEN VERLAG AUF DAS JAHR 5697 89 (1937)).

134. See, e.g., *No Sweat: Jewish Camps Pledge to Buy Sweatshop-free Clothing*, JEWISH TELEGRAPHIC AGENCY (Aug. 26, 2006), for discussion of the idea, for example of “kosher clothing.”

135. Christopher P. Vogt, *The Family as Cornerstone of the Good Life and the Good Society: Family Life in the Compendium of the Social Doctrine of the Church*, 27 REV. OF BUS. 13, 13 (2006).

136. *Id.* at 14–15. It is true that as a matter of fact, the Catholic conception of family life is not a reality. However, it is this vision of family life that is the Catholic model for all human relation. It is also the case that family is a group with the potential to “other” other people; in the family we get our first sense of everyone outside the family as other. (This is particularly strong in



However, the covenantal relationship within which we are born is not one that exists only as family members. Rather than being a unique relationship, the familial relationship is the blueprint for our relation to the broader human community. Through the “complex of interpersonal relationships” formed through marriage and family, “each human person is introduced into the ‘human family’ and into the ‘family of God.’”<sup>137</sup>

Even in secular terms, it seems clear that it is easier to develop an attitude of cherishing all others if we take as our paradigm our feelings for those with whom we are closest. A Mahayana Buddhist meditation suggests meditating first on the love for a mother as a method for developing a loving attitude toward all human beings.<sup>138</sup>

Some clearly would doubt whether this type of change in attitude is possible. In an examination of the Deuteronomic commandment on usury, Benjamin Nelson argues that “[t]he road from clan comradeship to universal society is beset with hazards,” specifically, a loss or attenuation of clan bonds of love.<sup>139</sup> He calls it a “tragedy of moral history that the expansion of the area of the moral community has ordinarily been gained through the sacrifice of the intensity of the moral bond,” suggesting “that all men have been becoming brothers by becoming equally others.”<sup>140</sup> Nonetheless, notwithstanding his pessimism, he clearly views it preferable to attempt to embody norms that treat all people equally over “one in which there are privileges for the insiders, temporary concessions for good neighbors and strangers, and no obligation at all toward distant ‘barbarians.’”<sup>141</sup>

Extending the covenantal notion of family relationships to all persons does not mean we as individuals can’t prioritize when making decisions, for example, about limited resources and who we as individuals can help as a practical matter. It may be that we have a greater obligation to those to whom we are closest with, precisely because we flourish in community.<sup>142</sup> But that is a practical limitation that does not say that those with whom we are closest in community are more valuable than others.<sup>143</sup> Acknowledging

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some families, such as the kind of Italian family I grew up in.) But, again, here I’m talking about the vision and the ideal put forth by Catholic thought.

137. John Paul II, Apostolic Exhortation on the Family in the Modern World, *Familiaris Consortio* ¶ 15 (1981), [http://w2.vatican.va/content/john-paul-ii/en/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_19811122\\_familiaris-consortio.html](http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html) [hereinafter *Familiaris Consortio*].

138. See, e.g., DESHUNG RINPOCHE, THE THREE LEVELS OF SPIRITUAL PERCEPTION 240 (2d ed. 2003) (explaining that “most of us have a certain amount of affection or fondness for the people we relate with through family”).

139. BENJAMIN N. NELSON, THE IDEA OF USURY: FROM TRIBAL BROTHERHOOD TO UNIVERSAL OTHERHOOD 136 (1949).

140. *Id.*

141. *Id.* at 137.

142. Some might argue that this greater obligation flows from the principle of subsidiarity.

143. Hanna Wolff describes the story of Jesus and the Good Samaritan as describing a movement from particularism “to a universalism that embraces the world and humanity.” HANNA WOLFF, JESUS THE THERAPIST 127 (1978).

that we are one family is key to the advancement of solidarity as a common virtue.<sup>144</sup>

Together, the notions of human dignity and solidarity, along with a sense that family provides a model for all human relations, provide a foundation for a legal system that respects and honors the rights of all persons and a model for how the law might serve as a positive force in countering othering. How the law might do so is taken up in Section IV.

#### IV. THE ROLE OF LAW IN MOVING FROM OTHERING TO COMMUNION

If our discussion of many polarizing legal issues is skewed by a view of certain groups as other, then the question is how to change the terms of the discourse—how do we encourage the development of a vision of persons that does not other them? Rather than contributing to othering, law can be a powerful force in combating it and the principles of Catholic Social Thought I just identified serve to shape the values the law ought to promote.

Although what is required ultimately is a change in heart, which is not accomplished simply by passage of the law, law plays an important part. Just as the law can promote othering, it has the capacity to express and thus promote values, such as human dignity and solidarity, which combat othering. To be sure, some of what the law does is attempt to compel certain behavior. However, equally—if not more—important, law can serve an expressive and pedagogical function in helping to foster cohesion.<sup>145</sup>

Cathy Kaveny advances a model of the law as “Moral Teacher,”<sup>146</sup> a model that recognizes that law “communicates something to its subjects about the ways in which they should and should not go about living their lives.”<sup>147</sup> In addressing the question of what should be the lessons of the law, she draws on the teachings of Aquinas to conclude that solidarity is

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144. The covenantal notion of family also doesn’t mean we don’t chastise those whose behavior is inconsistent with familial love. Indeed, chastising those who stray is part of familial responsibility. See Gregory C. Sisk & Charles J. Reid, Jr., *Abortion, Bishops, Eucharist and Politicians: A Question of Communion*, 43 CATH. LAWYER 255, 267–68 (2004) (observing that “[t]o fully achieve the joy and fellowship of full membership in our Catholic Church, we likewise must accept the responsibilities that accompany that affiliation. In a truly loving home, wayward children are called to account for their behavior and are instructed in how they must behave in order to be restored to full communion with their siblings.”).

145. I don’t mean to minimize the value of laws that force behavior, such as antidiscrimination laws that prevent discrimination against certain classes. But we know from our history that the passage of such laws are a necessary but not sufficient condition. I earlier noted the example of school desegregation, which continued to exist for years after the Supreme Court’s decision in *Brown*. See *Brown v. Board of Education*, 347 U.S. 483 (1954). Mandating integration of schools or banning forms of discrimination have no effect on implicit bias. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

146. Kaveny, *supra* note 63, at 349–58. Kaveny argues that “some of the most important pieces of legislation enacted in the United States in the second half of the twentieth century” are explained by the conception of law as teacher. *Id.* at 354.

147. *Id.* at 350.

one of the virtues that the law needs to teach.<sup>148</sup> Similarly, John Noonan has written about the power of law “to channel human energies toward cooperative relationships, and to teach the basic values of society.”<sup>149</sup>

In terms of the law’s capacity to promote values that combat othering, we are primarily concerned with the signaling effect of the law. That is, to what extent do our legislative and judicial enactments and the language of government officials promote human dignity, unification, and cohesion, rather than a division and a sense of othering? As the following discussion suggests, there are both easy answers and hard questions.

#### A. *Easy Answers*

Some potential approaches are easy and fairly direct. Antidiscrimination laws and laws punishing hate crimes send important signals. As limited as they may be in addressing implicit bias, they provide strong statements that certain groups may not be treated in a manner that adversely impacts their dignity as persons.

It is not, of course, enough merely to have such laws on the books. Self-evidently, for the law to have the appropriate signaling effect, the legal system must behave as though we take such laws seriously.<sup>150</sup> Regardless of what the letter of the law says, the failure to enforce certain laws sends a signal to the populace about what is or is not valued by those in power. “Do as I say, not as I do” is never very effective. People pay attention to what the law does, not just what it says. Indeed, the signaling function of enforcement efforts—or lack thereof—may be even stronger than the signaling function of the laws themselves, at least where there is significant publicity surrounding the action—or failure to act.

Other ways the law can promote values that counter tendencies to “other” are more subtle. The law and the way we talk about the law conveys a message apart from the substantive provisions it contains.

I’m talking in part here about the message conveyed by the laws themselves. Thus, for example, we need to ask whether our immigration laws reflect compassion and a desire to help rather than simply the exclusion of undesirables. Does our legislative approach to health care and poverty reflect a sense that poor people matter less? I am not making judgments about what the particular content of the law in a particular area must be. Rather, I

148. *Id.* at 353. The other virtue she thinks is appropriate for law to promote in the United States is autonomy, in the sense in which Joseph Raz uses the term, that is, in promoting a “vision of the person situated in, and interacting with, a community, in order to develop an identity that draws equally upon his unique talents and motivations and the opportunities provided by the broader society.” *Id.* at 349.

149. M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr., on Love and Power in Human History*, 11 J. L. & REL. 203, 210–11 (1994–95).

150. PHYLLIS B. BERSTENFELD, CRIMES OF HATE: SELECTED READINGS 266–67 (2004) (stating the fact that so few hate crimes reported result in prosecution “implicitly sends a message condoning hate violence by failing to prosecute hate crimes”).

am talking about an approach to evaluating the particular—a consideration that has to be part of our evaluation of a particular law. So, for example, an immigration law need not be one of completely open borders, but it must recognize the dignity of those persons seeking life in the United States. Similarly, avoiding othering does not require that we have national health insurance, but whatever law we do enact must proceed from the premise that it is unacceptable in our society for some people to lack access to affordable health care and that the government has some role in addressing that lack of access.

In part, I'm also talking about how government officials speak, recognizing that how we speak about each other has a tremendous effect on the people who hear that speech.<sup>151</sup> We are beginning another Presidential campaign season. Part of how we evaluate not only existing government officials, but also candidates for major political positions, ought to be whether they speak in a way that is unifying or divisive. In particular, we need to focus attention on how they speak about marginalized or unpopular groups and how they speak about each other. Does their speech reflect an attitude of a "global culture of solidarity"?<sup>152</sup> Or does it tend to divide us along race, gender, or other lines? And worse, does it do so in a way that suggests the other is less than we are?

Professor Robert Pecorella has suggested that commutative and contributive justice might entail "defining not just economic 'floors' beneath which human beings should not be allowed to fall, but economic 'ceilings' which define the point when people of 'good faith' simply have enough."<sup>153</sup> Leaving aside the complexity of picking an upper limit and things like the need to take into account regional differences,<sup>154</sup> the idea that not only does everyone deserve to have enough to flourish as a human person, but that there is a point at the upper end that is enough and beyond which is simply too much, is one worth thinking about. Yet, it is not in the cards for us to think about such a solution where we other those who have less than we have. It is worth asking what kind of effect there might be if our government officials started preaching what one conference called a "Virtue of

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151. J.B. White is someone who has written much on the power of language. See, e.g., J.B. WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006). In the preface of this book, he talks about the way language can "deny the value of ourselves and other people, and the activities of life we share."

152. See *supra* note 98 and accompanying text.

153. Robert F. Pecorella, *Property Rights, the Common Good and the State: The Catholic View of Market Economics*, 5 J. CATH. SOC. THOUGHT 235, 276 (2008). Professor Pecorella is not arguing that the government ought to define such a ceiling as a legal mandate. Rather, he suggests that the Church ought to include such an idea as an aspect of what "should be expected within the Catholic community." *Id.*

154. See *id.* The same difficulties arise if we attempt to apply the same suggestion to health care, for example. We could go a long way toward addressing health care costs by some system of rationing care. However, any kind of health care rationing system would be extremely dangerous absent a foundation of solidarity, rather than one of othering.

Enough.”<sup>155</sup> That might encourage a sense of obligation to use one’s surplus to meet the needs of those without.

### B. *Harder Questions*

To some extent, all laws make distinctions among people. They discriminate or categorize, at least in the sense that the law generally favors one group over another. A system of progressive income taxation means we draw a distinction between higher income and lower income persons in how much taxes we ask them to pay. Anti-discrimination laws permit airlines to refuse to allow a pilot above a certain age to fly a plane. At the other end of the spectrum, the law prohibits those who have not reached a certain age from obtaining a driver’s license or from voting.

However, not all distinctions are devaluing; not all distinctions signal that some are other.<sup>156</sup> The problem is not with the law making distinctions; the problem arises only when distinctions made in the law either create or reinforce the sense that some people are valued less than others, distinctions that negate the equal moral worth of all people.<sup>157</sup> There is a vast difference between a law that says blacks must sit at the back of a bus and a law that says that a person under the age of eighteen cannot vote.

The difficult task, or course, is deciding which distinctions devalue others and which are not morally questionable, a task that is complicated by the fact that other important values may be at stake that might justify othering.

In some cases, our desire to treat people differently stems precisely from a desire to promote their dignity and to allow them the means to flourish in community. Consider the example of affirmative action, a subject which is often hotly debated. One may have various grounds for supporting or promoting affirmative action, but it would be unfortunate if a superficial appeal to othering—the suggestion that affirmative action separates blacks and promotes othering—were permitted to short-circuit meaningful debate about a measure designed to address the historical effects of a dehumanizing othering. The same is true of programs designed to aid the poor. Such

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155. *Extreme Wealth and Poverty and the Virtue of Enough*, ST. JOHN’S U. (Oct. 17, 2009), <http://mirrorofjustice.blogs.com/files/poster09.pdf>.

156. See DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008) (distinguishing between discrimination that is demeaning and fails to treat others as moral equals and treating people differently where doing so is not demeaning). Starting from the premise that “it is often desirable and sometimes necessary to treat people differently,” Hellman’s book is an exploration of the question of “when discrimination is morally permissible and when it is not.” *Id.* at 4.

157. Hellman suggests that “drawing distinctions among people is morally permissible when doing so does not demean any of those affected.” *Id.* at 169. I wouldn’t phrase it quite that way because I am concerned not only with whether the subject of the discrimination feels demeaned, but also whether it appears to the rest of us that the law is demeaning the subject of discrimination. One would expect to see substantial overlap between those two ways of framing it, but the overlap may not be total.

programs clearly make distinctions—they single out the poor for distinctive treatment. But they do so for purposes that advance human dignity, not denigrate it.<sup>158</sup>

The short resolution is to suggest that distinctions that are motivated by a desire to address particular needs of subsets of the population do not promote the kind of othering with which I am concerned here. Where differential treatment by the law aims to rectify that which prevents the flourishing of the human person, where it doesn't devalue, that differential treatment is justified.

In other cases, the desire for the law to promote the kind of unity of which I am speaking might run up against the values of freedom of association and religious liberty. For example, what of a law that interferes with a decision by a Christian student group to limit its leadership positions to Christians?<sup>159</sup> Or, what of a law that requires Catholic Charities to place children for adoption with same-sex couples?<sup>160</sup> Or a law requiring employers with a religious objection to artificial birth control to provide contraception coverage to their employees?<sup>161</sup> Are such laws justified as efforts to promote dignity and equality of treatment and to combat an attitude of othering notwithstanding their impact on the freedom of association and religion of the Christian student groups in the first instance and the religious freedom of Catholic Charities in the second? Or are the values of freedom of association and of religion sufficiently strong that they should be respected notwithstanding their impact on the “othered” groups?

The resolution of these tensions is far more difficult. But the fact that some situations raise difficult questions does not change the fact that the law does provide signals and we need to be cognizant of what is signaled by our laws.

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158. Having raised the welfare example, let me also highlight the danger that my arguments will be viewed as a stalking horse for redistribution. One could attempt to take my arguments in a direction that says there can't be winners and losers and must therefore promote a policy of redistribution. However, as I suggested earlier, the problem is not the law making distinctions among persons, it is what underlies those distinctions. There will always be people worse off and better off in any society, but we can have that difference without the destructive kinds of attitudes I am concerned with here.

159. The Supreme Court has granted certiorari to decide whether a public university can refuse to recognize a religious student group because the group requires its leaders to share its religious beliefs. *Christian Legal Society v. Martinez*, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, 558 U.S. 1076 (2009).

160. In 2006, Catholic Charities of Boston determined it had no choice but to cease its adoption services because of a Massachusetts law that would require it to place children for adoption with homosexual couples. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, March 11, 2006, at A1.

161. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_, 134 S. Ct. 2751 (2014) the Supreme Court held that a closely held for-profit corporation with a religious objection could be exempt from the contraception coverage provisions of regulations adopted pursuant to the Affordable Care Act if there is a less restrictive means of furthering the law's interest).

## CONCLUSION

My ultimate concern is with changing attitudes, with replacing an attitude of othering with one that sees all persons as brothers and sisters, as part of the same human family. That is not a change that can be legislated into existence. However, just as the law can promote othering, it can have a positive effect in promoting a more cohesive view of human relationship. That change in attitude is likely to then effect further changes in the law to promote the dignity of all human persons. The law may not be capable of creating a world populated by people willing to give up their lives for one another,<sup>162</sup> but it can do more than it does now to promote a vision that does not accept othering.

I recognize there is a practical question of how possible it is to achieve what I would like to see the law achieve in this area. We have a democratic legislative process that does not necessarily take the broad public interest into account. Often, those who are “other” do not have a place at the table in which decisions are made about what the content of the law will be and/or a place in deciding how the law will be enforced. And the rise of interest group politics generally means a narrowing of concerns, a hardening of positions, and not one looking broadly at the public/human interest. I say this to acknowledge that I’m speaking normatively about what the law should do and about the direction in which it ought to move. Getting it to do that will not be an easy task.<sup>163</sup>

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162. *John* 15:13 (“Greater love has no one than this, that one lay down one’s life for his friend.”).

163. What role, if any, legal education might play in this process is an interesting question, but one that is beyond the scope of this article.